Supreme Court, U.S.
FILED
JUL 23 1992
OFFICE OF THE CLERK

No. 91-1974

In the Supreme Court of the United States

OCTOBER TERM, 1991

FEATHERLITE PRECAST CORPORATION,
PETITIONER

v.

JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS, and JIMMIE LOU FISHER LUMPKIN, Treasurer of the STATE OF ARKANSAS
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR THE PETITIONER

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Respondents argue essentially one point in their Brief in Opposition to support the Arkansas Supreme Court's decision below: i.e. Featherlite Precast Corporation ("Featherlite") was a manufacturer/materialman retailer that produced and sold components (tangible personal property) of large concrete structures to general contractors, and then, additionally, subcontracted erection services on the job sites. This is a factual mischaracterization by Respondent that is *not* supported by the stipulated evidentiary record nor the applicable Arkansas Sales and Use Tax statutes.

Featherlite was a fully licensed building contractor for heavy buildings during all of the years in suit. Featherlite per-

formed the same contracting or building services (utilizing the "precast" method of construction), under "lump sum contracts," as would any general contractor or specialty subcontractor who erected the large one-of-a-kind specially designed and engineered concrete structures by pouring the components of the structures "in place" on the Arkansas job sites. Thus, Featherlite and these other contractors were "similarly situated" competitors for Arkansas Sales and Use Tax purposes.

The Respondent's mischaracterization of Featherlite's status and activities in their Brief in Opposition are the issues to which the Petitioner's Reply Brief will be directed.

I. FEATHERLITE, AS A FULLY LICENSED BUILDING CONTRACTOR, IS "SIMILARLY SITUATED" TO GENERAL CONTRACTORS OR SPECIALTY SUBCONTRACTORS WHO CONSTRUCT LARGE CONCRETE STRUCTURES IN ARKANSAS UTILIZING THE "POURED IN PLACE" METHOD OF CONSTRUCTION.

In their Brief in Opposition (Br. Opp. 2-13), the Respondents continually refer to Featherlite as a precaster who (as a vendor) is selling component parts (tangible personal property) of large concrete structures to general contractors *and* sometimes subcontracting to also erect these structures on the Arkansas job sites. Respondents continually refer to the taxable base in dispute as the "sales price" of the component parts of the large concrete structure. The Petitioner submits that this is a blatant mischaracterization of the factual record stipulated in this case and one that may mislead the members of this Court in their review of the constitutional issues raised by Featherlite's Petition for Certiorari.

a. Similarly Situated Taxpayers. As noted in the Petition for Certiorari (Pet. 2-10), during the entire period in suit, Featherlite was a building contractor licensed by the Arkansas Contractors Licensing Board to engage in the construction of heavy

buildings (R. 210–216). Featherlite entered into standard "lump sum" subcontracts with general contractors to provide concrete structures erected and affixed to real estate on Arkansas job sites (R. 291–296). For all of the construction jobs questioned in this suit, Featherlite did *not* enter into contracts to sell tangible personal property to contractors, as a materialman–retailer, *and* then enter into a separate subcontract to erect the structures' components (tangible personal property) on the job sites.

Indeed, Featherlite's Vice–President and the representatives of the other two precasters all stated in their stipulated affidavits that: (1) the components of the large concrete structures were unique and specially designed for each construction job; (2) the components were not held as inventory items (i.e. general building materials); (3) there was no difference between the "off–site" and "on–site" casting activities of the precaster/contractor and the general or specialty subcontractor; and (4) solely because of the Arkansas DF&A's "administrative practice," contractors utilizing the "precast" method of construction were put at a substantial competitive pricing disadvantage when compared with their on–site general contractor or specialty subcontractor competitors who poured the same concrete structures "in place." (Dolson Affidavit, ¶ 7 (R. 268); McConnell Affidavit, ¶s 2, 3, 6 and 7 (230–231); and Berglund Affidavit, ¶s 2, 3, 6 and 7, R. 234–235)). [1]

The standard subcontract between Featherlite (the subcontractor) and Pickens–Bond Construction Company (the general contractor) that was stipulated into evidence by the parties for illustrative purposes (Stip. Ex. 1–E) (R. 291–296)), was a standard

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[1] The Respondent's reference (Br. Opp. p. 12) to Mr. Dolson's statement that "Featherlite acts in the role of a supplier of raw materials to the subcontractor or the general contractor" (R. 266). This is again a mischaracterization taken out of context. Mr. Dolson was not referring to the sale of "raw building materials" (sand, gravel, cement, reinforcing steel, etc.), but, in the context of his affidavit, he was describing how this precaster was treated by the other taxing jurisdictions in which the company operated, when Featherlite did not erect the structure on the job site.

preprinted "lump sum" subcontract wherein Featherlite agreed to provide an eight story parking deck erected on the job site in Little Rock, Arkansas, for a total consideration of $1,894,300.00. There is absolutely no breakdown in this illustrative "lump sum" subcontract for Featherlite's sale of (1) components, (2) hauling expenses, or (3) erection charges. Instead, like any subcontract entered into by a general construction contractor with a specialty cement subcontractor who would undertake the obligation to pour the components of the concrete parking deck "in place" on the Arkansas job site, Featherlite, as a licensed building contractor, agreed to provide a large concrete structure affixed to real property on the Arkansas job sites in return for a "lump sum" payment. In either instance, the general contractor had to complete detail work on the structure.

Therefore, Featherlite submits that it was acting as an Arkansas licensed contractor of heavy buildings, *not* as a materialman–retailer selling separate component parts for the concrete structures to a general contractor and then separately agreeing to erect the structure on the Arkansas job sites. The evidentiary record in this case clearly establishes that Featherlite, as a subcontractor working on the Arkansas job sites, was subjected to Arkansas' Use Tax in an amount that was 400% greater than would have been imposed upon a general contractor or a specialty subcontractor constructing the same concrete structure utilizing only the more traditional "poured in place" method of construction. Accordingly, Featherlite submits that the Respondents mislead the members of this Court in their Brief in Opposition by continually referring to the company as a precaster selling component parts and then separately subcontracting to perform construction services on the Arkansas job sites, when the factual record provides otherwise.[2]

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[2] In paragraph 16 of the Stipulation (R. 200), the Respondents stipulated with the Petitioner that the large parking deck which Featherlite produced and erected on the Arkansas job site, was a concrete structure that —

> was precast in Featherlite's plant in Memphis, Tennessee, and erected by Featherlite "on-site" at the Sixth Street location in

b. Legislatively Mandated Equality. As noted in the Petition for Certiorari (Pet. 9–10, 17–19), the Arkansas General Assembly has clearly evidenced its intention that similarly situated contractors, who utilized either the "on–site" or "off–site" methods of construction, should be treated exactly the same for Sales and Use Tax purposes. For Sales Tax purposes, Ark. Stat. Ann. § 26–52–103(9) and § 26–52–307 both state that a contractor is to be deemed the consumer of tangible personal property purchased for use in construction projects, and that such purchases are *not* sales for resale. Similarly, for Arkansas Use Tax purposes, Ark. Code Ann. § 26–53–201 and § 26–53–203(a)(1) make it clear that *all* contractors are to be deemed the consumers of the tangible personal property they purchase for use in these construction projects and that such purchases are to be subject to Arkansas' Use Tax. [3]

Though Featherlite was, during each of the periods in suit, a contractor licensed by the State to construct heavy buildings in Arkansas, the Arkansas DF&A's challenged "administrative prac–

Little Rock, Arkansas. Featherlite acted as a subcontractor of the General Contractor, Pickens–Bond Construction Company on this construction project.

In each of the 18 instances where Featherlite acted as a subcontractor that produced and erected concrete structures on Arkansas job sites during the periods in suit, the company acted as a subcontractor to a general contractor (Stip. Ex. 2–I (R. 218)), not as a mere materialman. However, in the 18 instances in which Featherlite produced, but did not erect, the concrete structure on the Arkansas job sites, in at least seven (7) of these instances, Featherlite contracted only with the property developer (e.g. International Paper Company, the State of Arkansas (Arkansas Department of Corrections), or the U.S. Department of the Army), and there was no general contractor involved. Thus, the Petitioner submits that precasters are also competitors of general contractors, since the precaster performed these same construction services "off site" for the property developer itself, who then arranged for the final erection of the concrete structure on the Arkansas job site (R. 219).

[3] See the full text of these Sales Tax and Use Tax statutes as set forth in Appendix G, *infra*, p. 51a.

tice" and the Arkansas Supreme Court's decision in this case ignore both this fact and the legislative mandate that *all* contractors are to be treated the same for Sales and Use Tax purposes. The Arkansas Supreme Court's holding that Featherlite acted in two distinct and separate capacities, (1) as a producer-vendor and (2) as a producer-subcontractor (308 Ark. 134-135), is a clearly erroneous finding. This mistaken characterization or classification by both the Arkansas DF&A and the Arkansas Supreme Court was based solely upon the Arkansas Supreme Court's prior creation of a "legal abstraction" in its decision in *Republic Steel Corporation v. McCastlain*, 240 Ark. 979, 403 S.W. 90 (1966). Featherlite was "deemed" by the Arkansas Supreme Court to have made a "fictional sale," as a manufacturer, to itself, as a subcontractor, simply because the company sometimes made sales of one of a kind concrete structures without also erecting the components on the Arkansas job sites.

This erroneous determination by the Arkansas Supreme Court has resulted in an assessment of Use Tax against Featherlite in an amount that is 400% greater than the amounts of Use Tax or Sales Tax that would have been assessed against similarly situated contractor-competitors who used the traditional "poured in place" methods of constructing the same concrete structures. These applications of the Commerce Clause and the Equal Protection Clause by the Arkansas Supreme Court do not meet the standards of equality set by this Court's prior decisions (*Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) and *Williams v. Vermont*, 472 U.S. 14 (1985)) for the treatment of "similarly situated" taxpayers. The decision here by the Arkansas Supreme Court is also in direct conflict with the decisions of the appellate courts of its sister states that have considered similar questions involving building contractors who prefabricate a part of the structure "off site" and then complete the structure by attaching it to real

property on the job site. [4] It is most interesting to note that the Respondents have not (and the Petitioner submits cannot) cite a decision by another state appellate court that has sustained the rationale of their "administrative practice" that is challenged here.

II. FOR EITHER COMMERCE CLAUSE PURPOSES OR EQUAL PROTECTION PURPOSES, A CONTRACTOR UTILIZING THE "PRECAST" METHOD OF CONSTRUCTION MUST BE TREATED THE SAME, FOR SALES AND USE TAX PURPOSES, AS A CONTRACTOR USING THE "POURED IN PLACE" METHOD OF CONSTRUCTION.

The Respondents argue (Br. Opp. 3, 9–11) that the Arkansas DF&A's "administrative practice" challenged by Featherlite in this proceeding meets all of the requirements of the Commerce Clause and the Equal Protection Clause because all "precasters" (whether their plants are located within or without the State of Arkansas) are treated the same for Sales and Use Tax purposes, and all general contractors (whether located within or without the State of Arkansas) are treated the same for Sales and Use Tax purposes. As noted in Featherlite's original Petition (Pet. 18–19), Petitioner submits that this "myopic" view of "similarly situated" competitor–contractors by the Arkansas DF&A and the Arkansas Supreme Court is *not* supported by the evidentiary record and was not one intended by any proper interpretation of a legislative act adopted by the Arkansas General Assembly.

Both the Arkansas DF&A and the Arkansas Supreme Court treat Featherlite and all other precasters as mere materialmen–retailers who are supplying only building materials to contractors, because the precasters do not always erect the unique concrete

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[4] *Chicago Bridge & Iron Co. v. Cocreham*, 317 So.2d 605 (La., 1975); *Chicago Bridge & Iron Co. v. Johnson*, 119 P.2d 945 (Cal. 1941); and *Hawes v. Ingalls Iron Works Co.*, 159 S.E.2d 434 (Ct. App. 1st Div. Ga., 1968).

structures on the job sites. This presents a situation somewhat akin to the situation faced in many states where fabricator/producers of items, such as custom cabinets, may or may not install the custom made (fabricated) items into the building itself. In such instances, where a sometime retailer also acts as a contractor, most all of the other state taxing jurisdictions have resolved the question of the proper imposition of Sales Taxes and Use Taxes by taxing the value of *only* the raw materials *when the retailer-contractor installs the custom built item in the structure itself.* On the other hand, these states tax the value of the entire custom built item, when the item is sold to the contractor who then does the installation itself.

This was the practical tax treatment given to the costs of construction of large concrete structures by the States of Tennessee, Louisiana and Texas (where Featherlite's plants were located during the period in suit). In fact, Featherlite submits that virtually all but 3 or 4 of the other 37 state taxing jurisdictions that tax *only* the cost of the tangible personal property incorporated into a structure by the contractor (and none of the costs of labor, overhead or profit) would apply this same rationale to contractors or subcontractors who fabricate or precast components of large concrete structures "off site" and then erect them "on-site" by permanently attaching them to the real property under the terms of a "lump sum" subcontract. [5]

This Court has mandated, for both Commerce Clause and Equal Protection Clause purposes, that "equality for purposes of competition and the flow of interstate commerce is measured in terms of dollars and cents, not legal abstractions." *Halliburton Oil*

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[5] See, Appendix F, *infra*, p.51a for a compilation or summary of the treatment of contractor-precasters by the various states that impose their Sales Taxes and Use Taxes upon only the cost of the tangible personal property purchased by a contractor to be incorporated into the construction of an improvement on real property (as opposed to taxing the value of the entire contract price, a practice that has been adopted by eight (8) states).

Well Cementing Co. v. Reily, 373 U.S. 64, 70 (1963) and *Williams v. Vermont*, 472 U.S. 14 (1985). Since the decision here by the Arkansas Supreme Court is the *only* reported decision that sustains such an arbitrary "administrative practice" by a state taxing authority, Featherlite submits that it is of utmost national importance for this Court to grant the Petition for Certiorari in this case, and reverse the decision of the state supreme court, solely for the purpose of protecting the integrity of this Court's prior Commerce Clause and Equal Protection Clause decisions on this point.

Featherlite submits that the decisions by the Arkansas Supreme Court in this case and the *Republic Steel* case have made Arkansas an "island unto itself" in the flow of interstate commerce for purposes of both Commerce Clause and Equal Protection jurisprudence. The courts of Arkansas' sister states that have considered similar cases have all consistently held that the contractor who prefabricates a part of the structure "off site," and then completes the entire structure on real property on the actual job site, must be treated, for Sales and Use Tax purposes, the same as the "on-site" contractor who constructs the structure utilizing more traditional methods of construction. See, *Chicago Bridge & Iron Co. v. Cocreham*, 317 So.2d 65 (La., 1975), *Chicago Bridge & Iron v. Johnson*, 119 P.2d 945 (Cal. 1941), *Hawes v. Ingalls Iron Works Co.*, 159 S.E.2d 434 (Ct. App. 1st. Div. Ga., 1968), and *Morton Builders, Inc. v. Bannon*, 1991 W.L. 144510 (Comm. Super., July 24, 1991). [6]

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[6] The only decided cases presenting exactly the same Sales and Use Tax question raised here for precasters of large concrete structures are the unreported decisions of the Court of Common Pleas, Spartanburg County, South Carolina, in the cases of *Tindall Concrete Products, Inc. v. South Carolina Tax Commission*, Docket No. 84-CP-42-13 (April 24, 1985) and *Metromont Materials Corp. v. South Carolina Tax Commission*, Docket No. 84-CP-42-14 (April 24, 1985). In both of these decisions, the South Carolina trial court held that the contractor-precaster must be taxed *only* upon the value of the "raw materials" (sand, gravel, cement, reinforcing steel, etc.) used in the construction of the large concrete structures, in the same manner that the general contractor who poured the components of the concrete structure "on-site" was treated for South Carolina Sales and Use Tax purposes.

The Arkansas DF&A's assertion that "all precasters within the state and without are taxed identically and all contractors within the state and without are taxed identically" (Br. Opp. p. 3) is *not* accurate or correct. Though the state taxing agency's "administrative practice" treats all precasters alike, it treats them *all only* as mere materialmen. When these precasters are performing construction functions as licensed contractors, under "lump sum" subcontracts, the Arkansas DF&A does *not* treat *all* "similarly situated" contractors within and without the state in an identical fashion for Sales and Use Tax purposes. Arkansas DF&A's "administrative practice" imposes Arkansas' Sales Taxes and Use Taxes upon contractor-precasters in an amount that is 400% greater than the excise tax imposed upon the contractor who utilizes the "poured-in-place" method of construction, in violation of the protections afforded Featherlite by both the Commerce Clause and Equal Protection Clause of the Federal Constitution.

CONCLUSION

For the foregoing reasons, the Petitioner submits that its Petition for a Writ of Certiorari to the Arkansas Supreme Court should be granted.

Respectfully submitted,

JULY 23, 1992

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APPENDIX F

State by State Summary of Sales and Use Tax Treatment of Contractor/Precasters

TABLE I

States That Tax Only Tangible Personal Property

There are 37 states and the District of Columbia that impose their Sales Taxes and Use Taxes only upon the cost of raw materials (tangible personal property) consumed by a contractor in the construction of improvements to real property, but do not impose these taxes upon the value of any labor, profit, overhead, or the cost of other construction services.

State	If Precaster, As Contractor, Erects Structure, On-Site Sales or Use Tax on Raw Materials Only	If Precaster Erects Structure, Cost of Hauling Components to Job Site Subject To Sales or Use Tax	Citation of State Authority
Alabama	Yes	No	DOR-Sales and Use Tax Rules B27-011, B27-012, and B27-081.
Arkansas	No	Yes	Pledger v. Featherlite Precast Corp., 823 S.W.2d 852 (1992)

California	Yes	No	Bd. of Equalization, Sales and Use Tax Reg. 1521(c)(3)
Colorado	Yes	No	CRS § 39-26-104(1)(a); DOR Sales and Use Tax Special Regulation For Specific Business, 1 CCR 201-5
Connecticut	No [1]	Yes	CGS § 12-407(8) and Public Acts 5 & 17, Conn. Gen. Assembly, Spec. Sess., May 1992
District of Columbia	Yes	No	D.C. Mun. Reg. Title 9, § 438.5 and .6
Florida	No [2]	No	Sales and Use Tax Rule 12A-1.045; Rule 12A-1.051(2) and (5)
Georgia	Yes	No	GCA § 48-8-63; Reg. 560-12-2-.26; Hawes v. Ingalls Iron Works Co., 159 S.E.2d 434 (Ct. App. 1st Div. Ga., 1968)
Idaho	Yes	No	IDAPA 35.02.09,3 and 3B; Id. St. Tax Comm. Reg. § 13.25
Illinois	Yes	No	86 Ill. Admin. Code, Chapt. I § § 130.415; 130.1940; 130.2075

State	If Precaster, As Contractor, Erects Structure, On-Site Sales or Use Tax on Raw Materials Only	If Precaster Erects Structure, Cost of Hauling Components to Job Site Subject To Sales or Use Tax	Citation of State Authority
Indiana	Perhaps [3]	No	I.C. 6-2.5-4-1; Rule 45 IAC 2.2-4-3(a)
Iowa	Yes	No	Admin. Reg. 701-19.4(422,423) and 19.14; Associated Gen.Contractors v. State Tax Comm., 123 N.W.2d 922 (Ia. 1963)
Kentucky	Yes	No	Reg. 103 KAR 26:070
Louisiana	Yes	No	Chicago Bridge & Iron Co. v. Cocreham, 317 So.2d 605 (La., 1975); Pensacola Construction Co. v. McNamara, 558 So.2d 231 (La., 1990); R.S. 47: 301(10)
Maine	Yes	No	Sales and Use Tax Instruction Bulletins Nos. 4 and 46
Maryland	Yes	No	ACM § 11-101(g) and (i)(2)
Massachusetts	Yes	No	DOR Letter Ruling 87-7

Minnesota	Yes	No	DOR Rule 8130.1200, Subpart 7; DOR Sales Tax Fact Sheet 128
Missouri	Yes	No	Admin. Reg. 12 CSR 10-3.028; 12 CSR 10-3.032; Whelen Engineering Co. v. Director of Revenues, No. RS-83-2404 (AHC 10/14/88)
Nebraska	Yes [4]	No	Neb. Stat. § 77-2702(3)
Nevada	Yes	No	NRC § 372.190-210, NAC 372.101(4), 190, 200, 210
New Jersey	Yes	No	N.J.S.A. § 54:32B - 2(e)(2) and - 8.11
New York	Yes	No	NY State Tax Reg. Title 20, Taxation & Finance, Compensating Use Tax, §531.3(b), § 541.11
North Carolina	Yes	No	N.C. Gen. Stat. § 105-164.3(16)
North Dakota	Yes	No	DOR Letter Ruling, Contractors deemed consumers of property purchase for construction
Ohio	Yes [5]	No	Ohio Rev. Stat. § 5741.01 (G)(1); DOT Rule 5703-9-14

State	If Precaster, As Contractor, Erects Structure, On-Site Sales or Use Tax on Raw Materials Only	If Precaster Erects Structure, Cost of Hauling Components to Job Site Subject To Sales or Use Tax	Citation of State Authority
Oklahoma	No [6]	No	Title 680.5, 1991 Supp. § 1352(c), (D), (I.), § 1362(c)
Pennsylvania	Yes	No	Dept. of Rev. Reg. § § 31.11 -- 31.16; § 54.1
Rhode Island	Yes	No	Div. of Tax Reg. SU 88-33; SU 91-27
South Carolina	Yes	No	SCCA § 12-35-110; Tindall Concrete Products v. South Carolina Tax Commission, Ct. of Comm. Pleas, Spartanburg County, Docket No. 84-CP-42-13, Opinion of April 24, 1985; Metromont Materials Corp. v. South Carolina Tax Commission, Ct. of Common Pleas; Spartanburg County, Docket No. 84-CP-42-14, Opinion of April 24, 1985.
Tennessee	Yes	No	TCA § 67-6-209; Tenn. Sales and Use Tax Rules 1320-5-1.-07 and -.08

Texas	Yes	No	Texas Tax Code § 151.007(a)(3) and § 151-007, Comptroller Rule 3.291
Utah	Yes	No	Utah Code Ann. § § 59-12-102 and 103; Reg. R865-19-588
Vermont	No [7]	No	43 V.S.A. § § 9773 and 9774; 32 V.S.A. § 9701(4)
Virginia	Yes	No	DOR Reg. § § 630-10-27 and 630-10-63
West Virginia	No [8]	No	W. Va. DOR Regs. § § 110-15-112 and 113
Wisconsin	Yes	No	Wis. Stat. § 77.51(2) and (4)(a); Wis. DOR Pub. 207
Wyoming	Yes	No	W.S. § 39-6-601 through 604

[1] Prior to May of 1992, the decision of the Connecticut Superior Court in the case of *Morton Builders, Inc. v. Bannon*, 1991 W.L. 144510 (Conn. Super., July 24, 1991) provided that contractor/fabricators were to be taxed only upon the cost of the raw materials incorporated into the completed structure. Adoption of Public Acts 5 and 17 by the May 1992 Spec. Sess. of the Connecticut Gen. Assbly. now directs that contractor/fabricators will be subject to Connecticut Sales and Use Tax on the entire contract price, whether the fabricator erects the structure or not.

[2] Florida taxes the value of materials fabricated "off-site," but only the value of the raw materials fabricated "on-site."

[3] The Indiana DOR is presently in litigation before the Indiana Tax Court with (1) an asphalt paver and (2) a prefabricated building company over these same issues. The prefabricated building company (Morton Builders, Inc.) alleges there is no Indiana Sales or Use Tax due at all upon the construction of such buildings.

[4] Neb. Stat. § 77-2702 grants a contractor an election to be taxed as a "retailer" or a "contractor." If the contractor elects *not* to be a retailer, the contractor is considered the consumer of the raw materials used in the construction project.

[5] Ohio Rev. Code, § 5741.01(G)(1) grants a manufacturer/contractor an election to be taxed as either. If the election is made to be a contractor, the Ohio Sales or Use Tax is imposed only upon the cost of the raw materials used in the construction project.

[6] Fabricators/contractors are subject to Oklahoma Sales or Use Tax on cost of raw materials only if they are consumers of 100% of product produced. If precaster sells any product produced to other contractors, Oklahoma Sales and Use Tax due on full sale price, as tangible personal property withdrawn from stock.

[7] Fabricators/contractors are subject to Vermont Sales or Use Tax on cost of raw materials only if they are consumers of 100% of product produced. If precaster sells any product produced to other contractors, Vermont Sales and Use Tax due on full sale price, as tangible personal property withdrawn from stock.

[8] West Virginia taxes the value of materials fabricated "off-site," but only the value of the raw materials if fabricated "on-site." West Virginia's DOR regulations differentiate between manufacturer/contractors and retailer/contractors.

TABLE II

STATES THAT TAX THE ENTIRE VALUE OF THE CONTRACT

The eight (8) States of Arizona, Hawaii, Kansas, Michigan, Mississippi, New Mexico, South Dakota and Washington impose an excise tax (e.g. Sales or Use Tax) upon the value of the entire contract price (i.e. tangible personal property, labor, profit, etc.), not just upon the value of the tangible personal property (e.g. raw materials) used to complete a construction contract. In these states, all raw materials are purchased on a tax exempt basis by the contractor or subcontractor.

TABLE III

STATES THAT DO NOT IMPOSE A SALES OR USE TAX

The 5 States of Alaska, Delaware, Montana, New Hampshire and Oregon do not have a Sales or Use Tax, and, therefore, no excise tax is imposed by these states upon the cost or charges for any kind of construction activities.

APPENDIX G
ARKANSAS STATUTORY PROVISIONS

Arkansas Gross Receipts (Sales) Tax Act

26-52-103. Definitions.

(a) The following words and phrases, except where the context clearly indicates a different meaning when used in this act, shall have the following meanings:

* * *

(9) "Consumer" or "user" means the person to whom the taxable sale is made or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies, and equipment used or consumed by them in performing any contract, and the sales of all such property to contractors are taxable sales within the meaning of this act;

26-52-307. Contractors are consumer users.

Sales of service and tangible personal property including materials, supplies, and equipment made to contractors who use them in the performance of any contract are declared to be sales to consumers or users and not sales for resale.

Arkansas Compensating (Use) Tax Act

26-53-201. Definition.

As used in this subchapter, unless the context otherwise requires, "contractors" are consumers of all tangible personal property used or consumed in the performance of a contract in this

state and of all tangible personal property stored for use or upon which the contractor may exercise any right or power in this state.

26-53-203. Tangible personal property procured from without state for use by contractors.

(a)(1) All tangible personal property which is procured from without this state for use, storage, or consumption including machinery, equipment, repair or replacement parts, materials, and supplies used, stored, or consumed by a contractor in the performance of a contract in this state shall be subject to the compensating tax of three percent (3%) of the purchase price as provided by the Arkansas Compensating Tax Act, § 26-53-101 et. seq., or three percent (3%) of its market or book value, whichever is greater, if the property has been subjected to prior use before coming to rest for use, storage, or consumption within this state.

(2) The tax shall be due and payable regardless of whether or not any right, title, or interest in the tangible personal property becomes vested in the contractor.